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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of DENNIS and MARSHA STACEY.	
DENNIS STACEY, Appellant, v. MARSHA STACEY, Respondent.	F075866 (Super. Ct. No. RFL-15-137) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Kern County. Donald P. Glennon, Jr., Commissioner.

Dennis Stacey, in pro. per., for Appellant.

Marsha Stacey, in pro. per., for Respondent.

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[*] Before Poochigian, Acting P.J., Franson, J. and Meehan, J.

Dennis Stacey (Dennis)[1] appeals, in propria persona, from an order denying his motion for reconsideration of an order awarding permanent spousal support and attorney fees to Marsha Stacey (Marsha). He contends the family court, in making these awards, improperly considered his "VA Disability" as income and failed to consider Marsha's earning capacity, which he claims she fabricated. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dennis filed for dissolution of his marriage to Marsha in August 2015. Both parties subsequently filed disclosures and the family court made various temporary orders, including temporary spousal support. A trial was held on March 14, 2017, at which income and expense declarations were admitted into evidence and the parties testified. The family court granted a judgment of dissolution and ruled on some of the issues, including spousal support. After considering the parties' income and other factors, the court ordered Dennis to pay Marsha $2,000 per month in spousal support and $8,000 for her attorney fees and costs. The court ordered the division of the parties' retirements and Dennis to continue pay Marsha her portion of his military benefits. The court took the remaining issues under submission. The family court ruled on those issues on April 6, 2017, when a copy of the minute order was mailed to the parties.

Dennis filed a motion for reconsideration of the judgment, apparently on April 21, 2017, which was heard on May 24, 2017. Both parties testified at the hearing. The family court denied the motion for reconsideration and ordered a typographical correction to the earlier ruling sua sponte.

[1] We will refer to the parties by their first names for purposes of clarity and not out of disrespect. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1, and cases cited therein.)

On June 21, 2017, Dennis filed a notice of appeal, in which he stated he was appealing from an order or judgment issued on "5-24-2017." Attached to the notice is a minute order of the May 24, 2017 hearing.

DISCUSSION

I. Appealability of the May 24, 2017 Order

We begin with the threshold issue of appealability. Marsha contends the order denying the motion for reconsideration is not an appealable order, and since Dennis did not list the March 14, 2017 judgment of dissolution or the April 6, 2017 ruling in his notice of appeal, this appeal must be dismissed. "The existence of an appealable order or judgment is a jurisdictional prerequisite to an appeal." (*Canandaigua Wine Co. v. County of Madera* (2009) 177 Cal.App.4th 298, 302.) "Accordingly, if the order or judgment is not appealable, the appeal must be dismissed." (*Ibid.*)

Here, the notice of appeal indicates the appeal is from the May 24, 2017 order, which was the order denying Dennis's motion for reconsideration of the order for spousal support and attorney fees. Generally, a motion for reconsideration is not separately appealable, but "if the order that was the subject of a motion for reconsideration is appealable, the denial of the motion for reconsideration is reviewable as part of an appeal from that order." (Code Civ. Proc., § 1008, subd. (g).) Here, the notice of appeal did not indicate Dennis was appealing from the underlying order for spousal support and attorney fees, which is an appealable order. (*In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1359.)

"The notice of appeal must be liberally construed." (Cal. Rules of Court, rule 8.100(a)(2).) If the notice of appeal specifies that the appeal is from a nonappealable order, " 'the notice can be interpreted to apply to an existing appealable order or judgment, if no prejudice would accrue to the respondent' " and if it is reasonably clear the appellant intended to appeal from the appealable order or judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20, 22.)

Although the notice indicated Dennis was appealing from the May 24, 2017 order, Dennis listed March 14, 2017, as the date of filing of the judgment or order being appealed in his notice designating the record on appeal, and both parties' briefs address the propriety of the underlying orders for support and attorney fees. As both parties apparently understood Dennis intended to appeal these orders and no prejudice would accrue to either party were we to construe the notice of appeal as encompassing them, we interpret the notice of appeal to apply to the March 14, 2017 orders.

II. The Inadequate Record Precludes Review

Dennis argues the trial court erred in ordering permanent spousal support and attorney fees. Because Dennis has failed to provide an adequate record for review, we must affirm.

The record Dennis has furnished us with is sparse. The clerk's transcript consists only of the family court's January 20, 2016, March 14, 2017, and May 24, 2017, minute orders, along with the notice of appeal, Dennis's notice designating the record on appeal, and the superior court's register of actions. While Dennis requested reporter's transcripts of the March 14 and May 24, 2017 hearings, there was no court reporter present at the hearings. According to the superior court clerk's affidavit, there were "FTR recordings" of the hearings that, pursuant to Government Code section 69957, cannot be transcribed. Dennis did not obtain an agreed or settled statement of the proceedings.

In an appeal, the appellate court is constitutionally required to presume the trial court's judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [" 'an ingredient of the constitutional doctrine of reversible error' "].) It is not the appellate court's burden to tell an appellant what documents or oral proceedings should be included in the record to prove the judgment incorrect. (*In re Marriage of Wilcox* (2004) 124 Cal.App.4th 492, 498–499 [appellate court declined appellant's invitation to "take it upon ourselves to fulfill his responsibilities"].) Appellants representing themselves have the same burden in this respect as appellants represented by counsel. (See, e.g., *Falahati*

v. Kondo (2005) 127 Cal.App.4th 823, 834 [pro se civil litigants held to same standard as attorney]; *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638–639 [held to same restrictive rules of civil procedure as attorneys].)

It is the appellant, not the appellate court, who has the burden of overcoming the presumption of correctness by, most fundamentally, providing an adequate record for review. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 [court declines to order rehearing on attorney fees because appellant failed to provide reporter's transcript or settled statement showing trial court's rationale for reduced award].) "A good test to apply is that if the particular form of record appears to show *any* need for *speculation or inference* in determining whether error occurred, the record is *inadequate*." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 4:43, pp. 4-12.) " 'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' " (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.) Thus, if an appellant asserts error based on only a partial record, and the missing part of the record could provide grounds for affirming the judgment, the appellate court will affirm the judgment. (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435.)

Both the award of spousal support and the award of attorney fees are primarily based on the spouses' relative need and ability to pay. (Fam. Code, §§ 2030, subd. (a), 4320, subds. (c) & (d).) In assessing one spouse's relative "need" and the other party's ability to pay, the court considers evidence concerning the parties' current incomes, assets, and abilities, including investment and income-producing properties. (Fam. Code, §§ 2030, subd. (a), 4320; *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1167.) Thus, the parties' income and expense declarations are usually the most important evidence considered in awarding spousal support and attorney fees.

The minute order of the March 14, 2017 hearing states that counsel stipulated to the parties' income and expense declarations being admitted, subject to cross-

examination, and that both parties testified. The declarations, however, are not part of the record on appeal. In addition, without a record of what occurred at the hearing, we cannot assess Dennis's claims of error. Where, as here, a transcript of proceedings in the trial court is unavailable, a party may substitute an agreed or settled statement for that portion of the designated proceedings. (Cal. Rules of Court, rules 8.120(b), 8.130(h); *People v. Sullivan* (2007) 151 Cal.App.4th 524, 548, fn. 5.) No agreed or settled statement has been provided to this court. Without the information in the parties' declarations and their testimony, we must presume the trial court properly exercised its discretion in ordering permanent support and attorney fees.[2] To the extent Dennis is contending the family court erred in denying his motion for reconsideration, we cannot

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[2] Dennis asserted, both in his brief and at oral argument, that the trial court's spousal support award violated the Uniformed Services Former Spouses' Protection Act, 10 United States Code section 1408 (USFSPA) and was contrary to *Howell v. Howell* (2017) __ U.S. __, 137 S.Ct. 1400 (*Howell*). Under the USFSPA, states are granted the authority to treat military retirement benefits, specifically "disposable retired pay," as divisible property upon divorce. (10 U.S.C. § 1408(c)(1); *Mansell v. Mansell* (1989) 490 U.S. 581, 588-589.) Disposable retired pay, however, does not include military retirement pay waived in order to receive veterans' disability payments. (10 U.S.C. § 1408(a)(4)(A)(ii); *Mansell v. Mansell*, *supra*, 490 U.S. at p. 589.)

In *Howell*, a military veteran waived a portion of his retirement pay post divorce so he could receive nontaxable compensation for a service-connected disability. (*Howell, supra*, 137 S.Ct. at p. 1404.) The waiver resulted in a reduction of military retirement pay awarded years earlier to the veteran's former spouse in a dissolution proceeding. (*Ibid.*) The state trial court ordered the veteran to ensure his former spouse received her full half of his retirement pay without regard for disability. (*Ibid.*) The United States Supreme Court held the USFSPA completely preempts states from treating waived military retirement pay as divisible community property; therefore, the order was improper and the former spouse was limited to receiving the reduced benefit. (*Howell, supra*, 137 S.Ct. at pp. 1402, 1405.)

The lack of an adequate record, however, precludes our review of Dennis's claim. Without the income and expense declarations, or a record of what occurred at the hearing, we cannot tell whether the trial court's spousal award was contrary to the USFSPA or the principle stated in *Howell*, as the record does not show the basis for the trial court's award.

assess his claim as he did not include his motion, any opposition papers filed, or an agreed or settled statement of what occurred at that hearing. In sum, Dennis has not demonstrated an abuse of discretion.

DISPOSITION

The orders for spousal support and attorney fees are affirmed. Dennis is ordered to pay costs on appeal.